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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HENRY,

Defendant and Appellant.

F036784

(Super. Ct. No. 99-43603)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert P. Anderson, Assistant Attorney General, W. Scott Thorpe and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Buckley, J., and Levy, J.

Appellant David Henry was found guilty after a jury trial of four counts of unlawful sexual intercourse by a person over age 21 on a person under age 16 (Pen. Code, § 261.5, subd. (d) [counts one, two, three, & six]), one count of oral copulation by a person over age 21 on a person under age 16 (Pen. Code, § 288a, subd. (b)(2) [count four]), and one count of penetration by foreign object by a person over age 21 on a person under age 16 (Pen. Code, § 289, subd. (i) [count five]). The trial court sentenced Henry to prison for three years eight months, suspended imposition of sentence, and placed Henry on probation upon various terms and conditions. The court ordered Henry to register as a sex offender pursuant to Penal Code section 290.

On appeal, Henry contends he was prejudiced by the trial court's admonition to the jury of CALJIC No. 17.41.1. Henry attacks the registration provisions of Penal Code section 290 as cruel and unusual punishment and as violating his right to equal protection. We will reject these contentions and affirm the trial court's judgment.

FACTS

Carina P. met Henry at a powwow in North Fork in August 1999. Henry was 21. Carina was 15.[1] The two began dating on August 9, 1999. On August 28, 1999, Carina and Henry met at a powwow in Lemoore and had sexual intercourse in her parents' car. Henry moved into the home of Carina's grandmother in early September 1999. One day in September, Henry picked Carina up from a mall, drove her to grandmother's house, and had sexual intercourse with her.

Carina visited Henry one weekend. The two engaged in sexual intercourse and oral sex. Henry also inserted his fingers into Carina's vagina. Carina and Henry had

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[1] Henry was born July 30, 1978, and had just turned 21 when he met Carina. Carina was born on October 22, 1983.

sexual intercourse on another occasion when her grandmother was on vacation in Hawaii. Carina did not attend school for two days so she could be with Henry.

A criminal complaint was filed against Henry on November 3, 1999. Henry continued conversing with Carina by telephone. In March 2000, Carina ran away with Henry to Reno and Las Vegas for five weeks. Carina and Henry had sexual intercourse on nearly a daily basis. Carina discussed marriage with Henry, but the two were never married.

Henry admitted his sexual relationship with Carina to investigators. Henry admitted to investigators that he was aware Carina was a minor and that his sexual relationship with her was a crime.

CALJIC No. 17.41.1

Henry contends the trial court erred in admonishing the jury with CALJIC No. 17.41.1.[2] Henry asserts the instruction undermined the independence of the jury by preventing the jury from exercising its community conscience and traditional power to nullify the law. Henry argues use of this instruction deprived him of his right to an impartial jury and a fair trial.

The substantive validity of CALJIC No. 17.41.1 is currently before the California Supreme Court. (*People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462.) The California Supreme Court recently decided that jurors are obligated to follow the law and that there is no right to jury nullification. (*People v. Williams* (2001) 25 Cal.4th 441, 461-463.) The court noted in *Williams* that it was not

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[2] The court admonished the jury with the following version of CALJIC 17.41.1:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the [c]ourt of the situation."

deciding the validity of CALJIC No. 17.41.1 because the instruction had not been written when the jury in that case was deliberating. (*Id*. at p. 446, fn. 3.) We are obligated to follow the decisions of our high court and must, therefore, reject Henry's assertion of a right to jury nullification. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The California Supreme Court also recently decided a trial court can abuse its discretion in excusing a juror before it is shown as a demonstrable reality that the juror refused to deliberate. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485-486.) No juror was, however, excused in the instant action. The holding in *Cleveland* is inapplicable to Henry's case.

Even if the California Supreme Court invalidates CALJIC No. 17.41.1, we find that the instruction caused no prejudice here. The evidence that Henry had a sexual relationship with a minor was undisputed.

Furthermore, nothing in the record demonstrates any juror had an inclination to acquit Henry or convict him of a lesser crime. There was one note from the jury requesting use during deliberations of charts prepared by the prosecutor. The parties agreed to send a note back to the jury indicating that the charts were not received into evidence. There is nothing in the record to show that there was dissension among the jurors or the sort of conflict alluded to in CALJIC No. 17.41.1.

On this record, there is no reasonable probability the jury would have reached a different outcome had the court not admonished the jury with CALJIC No. 17.41.1. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Indeed, the facts supporting Henry's conviction in the instant action are strong enough that the error, if any, in admonishing

the jury with CALJIC No. 17.41.1 was harmless beyond a reasonable doubt.[3] (See *Chapman v. California* (1967) 386 U.S. 18.)

EQUAL PROTECTION

Henry contends the requirement that he register under Penal Code section 290 violates the equal protection clause of the Fourteenth Amendment. Henry argues that there is no rational basis for a statutory scheme that mandates sex offender registration for digital penetration and oral copulation but not for unlawful intercourse. Henry contends there is virtually no distinction that can be drawn between unlawful intercourse and the other two sex acts.

The fact that there are classes of sex offenses which are not subject to the registration requirement and others which are subject to registration does not, per se, require a finding that the equal protection clause was violated. (*People v. Mills* (1978) 81 Cal.App.3d 171, 181; see also *People v. Monroe* (1985) 168 Cal.App.3d 1205, 1215.) The *Mills* case is clear that it is the defendant who bears the burden of showing there is no rational basis for the legislative determination that persons who violate Penal Code section 288a, subdivision (b)(2) are likely to be recidivists and should be required to register as sex offenders under Penal Code section 290. The same can be said for digital penetration pursuant to Penal Code section 289, subdivision (i). We find that Henry has not met his burden of showing that the legislative scheme is irrational.

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[3] The California Supreme Court has recently applied the *Watson* standard of review to alleged instructional errors involving failure to give proper lesser offense instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 164-179 [lesser included offenses in noncapital murder case]; *People v. Lee* (1999) 20 Cal.4th 47, 62 [omission of misdemeanor manslaughter instruction]; *People v. Coddington* (2000) 23 Cal.4th 529, 593 [omission of implied malice form of second degree murder] [overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13].)

CRUEL AND UNUSUAL PUNISHMENT

Henry argues that sex offender registration for his offenses constitutes cruel and unusual punishment.

In *People v. Monroe*, *supra*, 168 Cal.App.3d 1205, Justice Brown authored an opinion analyzing whether Penal Code section 290 registration constituted cruel and unusual punishment where a defendant has been convicted of misdemeanor child annoyance and molestation and contributing to the delinquency of a minor. Both convictions were misdemeanors. (*Id*. at p. 1207.) Our *Monroe* case exhaustively reviewed the punishment using the three-pronged test announced in *In re Lynch* (1972) 8 Cal.3d 410. (*Id*. at pp. 1209-1215.) The *Monroe* case concluded that sex offender registration for two misdemeanor offenses did not constitute cruel or unusual punishment. (*Id*. at p. 1216.)

Henry was convicted of six felony offenses, not two misdemeanors. We see no reason to deviate from *Monroe* and we apply its holding to the instant action. (See also *People v. Mills*, *supra*, 81 Cal.App.3d 171, 176-180.)

DISPOSITION

The judgment is affirmed.